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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 214

In the Matter of
BRIGANTINE BEACH HOTEL CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No.

In the Matter of:

BRIGANTINE BEACH HOTEL CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Brigantine Beach Hotel Corporation, Petitioner, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, and shows:

SUMMARY STATEMENT OF FACTS.

On January 26, 1951, Brigantine Beach Hotel Corporation, the owner of a hotel at Brigantine Beach, New Jersey, filed its petition for an arrangement under Chapter XI of the Bankruptcy Act.

The plan provided for the payment of all preferred claims, the costs of administration and the payment of general creditors in full within a period of one-year from confirmation (Appendix 10a).

The plan was assented to and accepted by a majority of creditors (Appendix 11a).

On October 5, 1951, the District Court entered an order awarding fees and expenses to the Receiver, appraiser and various attorneys and directed the debtor to deposit this sum with the Court, in order to carry out the terms of the debtor's plan of arrangement (Appendix 12a).

From several of these awards the debtor took an appeal, on the ground that the allowances were not in conformity with the provisions of the Bankruptcy Act, were outside the power of the Court to grant and were otherwise excessive and unwarranted (Appendix 5a, 13a).

An attorney for creditors also took an appeal on the ground that the award to him was inadequate.

While these two appeals, filed and docketed, were awaiting ultimate disposition in the Appellate Court, the District Court, reversing its position, entered an order refusing confirmation of debtor's plan of arrangement and adjudged the debtor a bankrupt (Appendix 8a).

A petition for rehearing was denied.

Debtor then appealed from the orders adjudging debtor a bankrupt and denying the rehearing.

The Court of Appeals, on debtor's appeal on allowances, modified the District Court's order and remanded it for further action not inconsistent with its opinion. It dismissed the attorney's appeal for additional allowance. It affirmed the order adjudging the debtor a bankrupt.

A petition by the debtor for rehearing on this last appeal was denied.

It is upon this matter that this petition for certiorari is presented.

JURISDICTIONAL STATEMENT.

The opinion of the Court of Appeals was filed June 3, 1952.

Jurisdiction to issue the writ is found in the provisions of the Act of June 25, 1948, C. 646, 62 Stat. 928; 28 U. S. C. A. Section 1254.

QUESTION PRESENTED.

The question involved is, whether or not, in a proceeding under Chapter XI of the Bankruptcy Act, when an appeal from an order, made by the District Court, pursuant to a plan of arrangement, is perfected and pending in the Court of Appeals, the jurisdiction of the cause is exclusively in that Court, and while there, the District Court is wholly without power to make a second order, adjudicating the debtor a bankrupt, and destroying the plan.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court of Appeals is in conflict with that of the Supreme Court, as well as with the 1st Circuit and also the 8th Circuit.

(2) There is now a conflict between the opinion of the Third Circuit in this case with the theory and reasoning of its own Court in a previous decision.

(3) The important question of the jurisdiction of the Court of Appeals in so far as it relates to proceedings under Chapter XI of the Bankruptcy Act requires clarification and should be settled by this Court.

(4) The judgment of the Court of Appeals affirming the District Court was erroneous.

CONCLUSION.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals, for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case, numbered and entitled on its docket #10,690, *In re Brigantine Beach Hotel Corporation,* to the end that this cause may be reviewed and determined by this Court and that the judgment of the United States Court of Appeals, for the Third Circuit, be reversed.

BRIGANTINE BEACH HOTEL CORPORATION,

By

I. EMANUEL SAUDER,

PHILIP STERLING,

Attorneys for Petitioner.

Dated:

BRIEF IN SUPPORT OF PETITION.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals is not yet reported.

QUESTION PRESENTED.

The question presented is stated in the preceding petition (page 3 hereof).

STATEMENT OF THE CASE.

This has already been presented in the preceding petition (page 2 hereof), is hereby adopted and made part of this brief.

SPECIFICATION OF ERROR.

The Court below erred: In affirming the Order of the District Court.

ARGUMENT.

(1) By reason of the Court's affirmance, there is now a conflict between the Third Circuit and the Supreme Court, as well as the First Circuit and also the Eighth Circuit.

The Court of Appeals failed to consider or to give any weight to the language of Justice Bradley, speaking for the Supreme Court, in *Hovey v. McDonald,* 109 U. S. 150 (1883), to the effect that there is one general rule in all cases, and that is that an appeal suspends the power of the Court below to proceed further in the cause (except to perfect its judgment or to correct clerical errors).

The Third Circuit disregarded the case of *Bergeron v. Mansour,* 152 Fed. (2) 1927 (1945), decided by the First Circuit, as well as the cases of *Jordan v. Federal Farm Mortgage Corp.,* 152 Fed. (2) 642, Cer. denied 66 Sup. Ct. 1339, 328 U. S. 821, 90 L. Ed. 1601, Cer. dismissed 66 St. Ct. 1340, 328 U. S. 852, 90 L. Ed. 1624 and *Midland Term. Ry. Co. v. Warriner,* 294 Fed. 185 (1923), both of which came from the Eighth Circuit, and all of which held that where appeals have been perfected, the District Court loses jurisdiction of the cause which is transferred to the Appellate Court, and thereby created a conflict which should be resolved by this Court.

(2) The decision of the Court of Appeals is in conflict with the theory and reasoning of its own Court in a previous decision.

In the case of *In Re Technical Marine Maintenance Co.,* 3rd Cir., 169 Fed. (2) 548, 551-552 (1948), the Court of

Appeals held that the taking of an appeal from the first order vested this Court with jurisdiction to hear and consider all matters and the District Judge had no power thereafter to reconsider these matters directly. That which he could not do directly, he could not do indirectly, by destroying the foundation of the whole proceeding, and yet that is what, in the instant case, the Court of Appeals, by its affirmance of the District Court, has permitted it to do.

The District Court, after making allowances to the Receiver, etc., and directing the deposit of these funds to complete the plan of arrangement, by its order of adjudication, while appeals were pending from the orders previously made, reconsidered the matter, and thus destroyed or impaired the very subject of the pending appeals and thus interfered with the Appellate Court's authority to make its jurisdiction effective.

The Court of Appeals had thus previously held that the District Court could not do this directly or indirectly and the present opinion is therefore in marked conflict with its previous ruling.

(3) The important question of the jurisdiction of the Court of Appeals in so far as it relates to proceedings under Chapter XI of the Bankruptcy Act require clarification and should be settled by this Court.

The Court of Appeals of the 9th Circuit, in the case of *Goggin v. Bank of America National Trust and Savings Association,* 186 Fed. (2) 158, 161-162 (which was also a Chapter XI proceeding), held that an appeal from the allowances of creditors' claims took with it all jurisdiction to act upon a receiver's petition to subordinate claims.

The Supreme Court denied a petition for certiorari thereon.

The same Circuit, in the case of *Diamond Laundry vs. California Employment Stabilization Commission,* 162 Fed. (2) 398-402 (1947), likewise held that where an appeal from judgment confirming an order of Referee allowing claims had been perfected, jurisdiction passed to the Court of Appeals and the District Court had no jurisdiction to entertain additional objections.

The Court of Appeals in the present case holds that the appeals on allowances even though they affect the whole plan of arrangement under Chapter XI, do not carry jurisdiction of the entire cause to the Court of Appeals.

In reaching this conclusion it fails to follow the foregoing cases but chooses instead to follow cases in the 10th Circuit, *Fernow v. Liberty Royalties Corp.*, 146 Fed. (2) 396 (1944), and in the 9th Circuit, *In re Woodruff*, 121 Fed. (2) 152 (1941), neither of which bear little resemblance to the present case. Neither were proceedings under Chapter XI; neither of them involved the entry of two diametrically opposed orders of the District Court, one of which destroys the other, while appeals were pending in the Appellate Court.

This leaves the whole question undecided and it should be settled by this Court.

(4) The judgment of the Court of Appeals affirming the District Court was erroneous.

The order of the District Court awarding fees to the Receiver, appraiser and attorneys, and directing the deposit by the debtor of sufficient moneys to effectuate and carry out the plan of arrangement proposed by it and accepted by creditors was not an interlocutory order. It was an order which carried with it confirmation or failure of the whole plan.

An appeal from that order necessarily carried with it jurisdiction of the entire cause.

A subsequent adjudication in bankruptcy in the District Court, while appeals were pending, clearly would interfere with the jurisdiction of the Appellate Court and impinge upon any order it might make therein.

It would, and did, destroy the subject of the first appeals.

The Appellate Court itself, in a footnote to its opinion (page 8), admitted that it made the question involved in the first appeal academic.

The judgment of the Court of Appeals affirming the District Court was erroneous.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari directed to the United States Court of Appeals, Third Circuit, and thereafter reviewing and reversing said decision.

BRIGANTINE BEACH HOTEL CORPORATION,
By
I. EMANUEL SAUDER,
PHILIP STERLING,
Attorneys for Petitioner.